**Flatt v Mann-Jones**

[1974] 1 EA 182 (HCK)

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 21 November 1973

**Case Number:** 1558/1969 (65/74)

**Before:** Simpson J

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*[1] Animal – Highway – Straying cow – Owner not liable for damage to motorist.*

**Editor’s Summary**

The plaintiff sued the defendant for damage caused to her car when she swerved to avoid the defendant’s

cows which the judge held had strayed on to the road through inadequate fencing.

**Held –** the owner of cattle straying on a highway is not liable for damage resulting therefrom (*Searle v.*

*Wallbank* (2) followed).

Case dismissed.

**Cases referred to Judgment:**

(1) *Mason v. Keeling* (1669), 91 E.R. 1035; [1558 – 1774] All E.R. Rep. 625.

(2) *Searle v. Wallbank*, [1947] A.C. 341; [1947] 1 All E.R. 12.

(3) *Brock v. Richards*, [1951] 1 K.B. 529; [1951] 1 All E.R. 261.

(4) *Gombeg v. Smith*, [1963] 1 Q.B. 25; [1962] 1 All E.R. 725.

(5) *Fitzgerald v. Cooke Bourne* (*Farms*) *Ltd*., [1964] 1 Q.B. 249; [1963] 3 All E.R. 36.

**Judgment**

**Simpson J:** On 2 May 1969, at about 10.30 p.m. the plaintiff was driving her Mini Minor motor car

along Karen Road towards Langata in heavy rain and poor visibility. That section of Karen Road runs

from Ngong Road to Langata Road and after a bend at its junction with Ngong Road is straight for a

distance of approximately one mile. On the left hand side up to a point approximately 300 yards from the

junction with Langata Road lies the farm then occupied by the defendant. On the right for roughly half

the distance from Ngong Road there is waste and grazing land. The remaining half consists of large

residential plots.

According to the plaintiff she was travelling at about 30 – 35 m.p.h. with her headlights dipped

(having just passed on oncoming vehicle) when she suddenly saw two cows in front of her. She braked

and swerved. The car skidded and ended up in the ditch on the right-hand side of the road 300 to 400

yards from the Langata Road junction. The defendant she alleges was the owner of these cows. The car

was a write-off and she claims damages.

The plaintiff claims under three alternative heads – negligence, nuisance and obstruction of the

highway.

[The judge considered the evidence and continued.]

I find that the cattle which caused the accident were not brought on to the road by the defendant or his

servants. They strayed on to the road owing to the failure of the defendant to provide adequate fencing or

other safeguards to prevent such straying.

Although I have no doubt that this is by no means the first such case there

Page 183 of [1974] 1 EA 182 (HCK)

appears to be no reported case in East Africa in which the liability of the owner of animals straying on to

the highway has been considered.

In England the common law rules relating to liability in such circumstances have been replaced by the

provisions of the Animals Act, 1971 which removed the distinction between animals brought onto the

road and animals straying on to the road. If this accident had occurred in England after the coming into

force of that Act there seems little doubt that subject to any finding with regard to contributory

negligence the defendant would have been held liable.

It was submitted on behalf of the plaintiff that since the question has not previously been considered

here it was open to this Court to disregard English decisions prior to the coming into force of the Animals

Act 1971, which decisions in any case have only persuasive effect and to follow the present English law.

By virtue of the provisions of the Judicature Act (Cap. 8) however the jurisdiction of this Court must be

exercised in conformity with the substance of the common law in force in England on 12 August 1897

not as amended by English statutes subsequent to that date which have no force in Kenya. It has not been

argued no do I think it could be argued that the circumstances of Kenya and its inhabitants render

necessary any qualifications of the relevant rules of common law.

Even if it should result in injustice to the plaintiff I must decide in accordance with these rules.

The leading case is *Searle v. Wallbank*, [1947] 1 All E.R. 12 which concerned a cyclist injured by a

horse which strayed from a field adjoining the highway through a defective fence. The House of Lords

reviewed earlier authorities including the following passage from *Mason v. Keeling*, a 1699 case:

“If the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse or

the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie

against the owner. Otherwise if he had notice that they had done such a thing before.”

At p. 21 Lord Du Parcq said:

“[Counsel] contended, however, that one who keeps his cattle on land adjoining the highway behind an

apparently secure fence must see to it that it is, in fact, secure, for otherwise (he said) a deceptive feeling of

safety will be induced in the passing cyclist or motorist. My Lords, I should have thought that, on principle,

where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is

imperfect, but, however that may be, the argument takes little account of rural conditions. . . The truth is that,

at least on country roads and in market towns, users of the highway, including cyclists and motorists, must be

prepared to meet from time to time a stray horse or cow, just as they must expect to encounter a herd of cattle

in the care of a drover. An underlying principle of the law of the highway is that all those lawfully using the

highway, or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the

farmer’s cattle: the farmer must endure the motorist. It is commonly part of a man’s legal duty to his

neighbour to tolerate the untoward results of his neighbour’s lawful acts. These observations are, I think,

relevant not only to the issue of negligence, but also to the allegation of nuisance. The stray horse on the road

does not seriously interfere with the exercise of a common right and is no more a nuisance in law, merely by

reason of its presence there, than the fallen cart-horse or its modern analogue, the lorry which has temporarily

broken down.”

Page 184 of [1974] 1 EA 182 (HCK)

It was held that there was no *prima facie* legal obligation of the defendant as owner of a field abutting on

the highway to users of the highway so to maintain his fence as to prevent his animals from straying on to

the highway.

In *Fitzgerald v. Cooke Bourne* (*Farms*) *Ltd*., [1963] 3 All E.R. 36 Diplock, L. J. said:

“. . . the owner of domestic animals which are not known to him to be vicious . . . which are grazing on land

on which he has a right to departure them, owes no duty to a person exercising his right of using a highway

which passes across or adjoins that land to take any steps to prevent their causing damage in the course of

following the natural propensities of their kind.”

To stray is a natural propensity of cattle and even a special proclivity towards straying was held in *Brock*

*v. Richards*, [1951] 1 All E.R. 261 not to impose liability. Unless the animal had to the knowledge of the

owner characteristics of viciousness, a savage disposition, a propensity to attack people, or

mischievousness, was dangerous because of its frolicsome behaviour, not because it caused an

obstruction but because it was likely to indulge its dangerous propensities, the owner was not liable.

In *Gomberg v. Smith*, [1962] 1 All E.R. 725 at p. 733 Davies, L.J. referred to “the ancient and

well-established rule that the owner or occupier of land adjoining a highway is under no duty to prevent

what are sometimes called domestic animals from escaping on to the highway” and agreed with Harman,

L.J. that there was nothing in the authorities which established any distinction between towns or urban

areas and country districts.

These authorities are of persuasive effect only in Kenya but they set out the rules of common law

applicable in Kenya in the absence of any qualifying legislation.

The owner of cattle which stray on to a highway and by their presence on that highway cause an

accident is not liable for any damage resulting therefrom. This is so whether the land from which they

stray is entirely unfenced or is inadequately fenced and whether it is in a rural or an urban area. The rule

does not however apply in the case of an animal known to have dangerous propensities where the damage

caused by it is due to its indulgence in such dangerous propensities. A propensity to stray is not a

dangerous propensity.

It may be that under modern conditions a change in the law is overdue but that is a matter for

Parliament.

The plaintiff’s claim is dismissed with costs to the defendant.

*Order accordingly.*

For the plaintiff:

*SS Dhanji* (instructed by *Archer & Wilcock*, Nairobi)